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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF THE PETITIONER FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF AFTER ARGUMENT AND
SUPPLEMENTAL BRIEF FOR THE PETITIONER

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No. 90-889

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**MOTION OF THE PETITIONER FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF AFTER ARGUMENT**

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, the Solicitor General, on behalf of petitioner William "Sky" King, respectfully moves for leave to file the attached supplemental brief. At oral argument in this case, counsel for petitioner was asked whether Section 2024(c) of the Veterans' Reemployment Rights Act, 38 U.S.C. 2024(c), provides petitioner with reemployment protection for his service in the Alabama National Guard as a member of the Active Guard Reserve (AGR) Program. That issue had not been addressed in the courts below or in the parties' briefs, since the parties

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and the lower courts agreed (see Pet. App. 18a n.8; 5a-6a) that Section 2024(d) applies in this case.

Since this issue has not been briefed, we bring to the Court's attention the statutory and regulatory basis for counsel's response, which was that petitioner's tour of duty in the AGR Program does not qualify as an "initial period of active duty for training" entitled to protection under Section 2024(c). We believe that these materials will aid the Court in its consideration of the question whether Section 2024(c) applies to the type of duty performed by petitioner.

For the foregoing reasons, it is respectfully submitted that the motion for leave to file the attached supplemental brief after argument should be granted.

KENNETH W. STARR
Solicitor General

OCTOBER 1991

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

At oral argument in this case, counsel for petitioner was asked whether Section 2024(c) of the Veterans' Reemployment Rights Act, 38 U.S.C. 2024(c), provides petitioner with reemployment protection for his service in the Alabama National Guard as a member of the Active Guard Reserve (AGR) Program. The purpose of this supplemental brief is to bring to the Court's attention the statutory and regulatory basis for counsel's response, which was that petitioner's tour of duty in the AGR Program does not qualify as an "initial period of active duty for training" entitled to protection under Section 2024(c).

(1)

The statutes and regulations show that the "initial period of active duty for training" referred to in Section 2024(c) is a mandatory, one-time tour of "basic training" that is required of newly enlisted Reservists without prior military experience. The statutory requirement for such initial training is set forth in 10 U.S.C. 511(d), which authorizes enlistment in the Reserve components (including the Army National Guard), and provides that "a non-prior-service person *** shall perform an initial period of active duty for training of not less than twelve weeks to commence insofar as practicable within 270 days after the date of *** enlistment."* In short, the "initial period of active duty for training" covered by Section 2024(c) is the "initial period of active duty for training" referred to in Section 511(d).

Petitioner's three-year tour of full-time service in the Active Guard Reserve was not "an initial period of active duty for training." Petitioner first enlisted in the Alabama National Guard 38 years ago; when he left his work at respondent hospital in 1987, he was

* Regulations promulgated under Section 511(d) provide that the period of "initial" training must be performed "with minimum practicable delay after enlistment," 32 C.F.R. 132.3(d), and that new Reservists are to be enrolled "only to the extent that initial active-duty-for-training spaces are expected to be available within 180 days from the dates of enlistment." *Id.* at 132.3(a). The regulations further state that "advanced individual training in specific military skills" is available to members of the Reserve components only upon "completion of their basic training." *Id.* at 132.3(h). Finally, "in order to assure uniformity of training and discipline," the regulations require members of the Army and Air National Guard to perform basic training as "Reserves of the Army or of the Air Force, as appropriate." *Id.* at 132.3(g). That is, they must serve in federal status, not, as did petitioner here, in state status. See Pet. Br. 34-35 & nn.25, 26.

not a new recruit engaged in a mandatory tour of basic training on the authority of 10 U.S.C. 511(d). Rather, he was a long-time member of the Alabama National Guard performing optional service under an entirely different provision, 32 U.S.C. 502(f), for the purpose of "organizing, administering, recruiting, instructing [and] training" the state National Guard units. Petitioner's full-time support duty in the National Guard is "active duty for training"—not an "initial period of active duty for training"—for purposes of Title 38. See 38 U.S.C. 101(22), 2024(f). Therefore, the reemployment rights provision that applies in petitioner's case is Section 2024(d), not Section 2024(c).

For the foregoing reasons, and the reasons stated in our brief on the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted,

KENNETH W. STARR
Solicitor General

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